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**Pro Hac Vice*

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10 IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 STATE OF CALIFORNIA, *et al.*,

Case No. 3:20-cv-03005-RS

12 *Plaintiffs,*

13 v.

**AMICUS CURIAE BRIEF OF
BUCKMAN DIRECT DIVERSION
BOARD IN SUPPORT OF THE
PLAINTIFFS' PARTIAL OPPOSITION
TO DEFENDANTS' MOTION FOR
REMAND WITHOUT VACATUR**

14 MICHAEL REGAN *et al.*,

15 *Defendants,*

16 and

Hearing: September 9, 2021 1:30 p.m.
Judge: Hon. Richard Seeborg

17 STATE OF GEORGIA, *et al.*,

18 *Intervenor-Defendants.*
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INTRODUCTION AND INTEREST OF AMICUS CURIAE

The Buckman Direct Diversion (the “BDD”) is a water supply project that is operated jointly by the City of Santa Fe and Santa Fe County, New Mexico and is managed by the intergovernmental Buckman Direct Diversion Board. The BDD diverts up to 8,730 acre feet per year (2.84 billion gallons) of water supplied by the U.S. Bureau of Reclamation San Juan-Chama Project, as well as native pre-1907 New Mexico water rights, from the Rio Grande to supply drinking water to Santa Fe regional water customers. The BDD Board submits this *amicus curiae* brief to provide its unique perspective as a water utility in the arid West that is directly and adversely impacted by the categorical exclusion of ephemeral streams from Clean Water Act protection under the Navigable Waters Protection Rule: Definition of “Waters of the United States” 85 Fed. Reg. 22,250 (Jun. 22, 2020) (hereinafter the “Rule”).

Geographically, the BDD is located west of the City of Santa Fe, New Mexico on the Rio Grande and is downstream of the city of Española, the community of Los Alamos, and the Los Alamos National Laboratory (“LANL”). LANL is located on the Pajarito Plateau, to the west of the Rio Grande, which is the watershed for several ephemeral streams that are tributaries to the Rio Grande upstream of the BDD intake. The BDD relies on the Rio Grande as its source water and will be adversely affected by any reduction in the water quality of the Rio Grande due to polluted runoff from these upstream tributary ephemeral streams. Because the Rule excludes ephemeral streams from Clean Water Act (“CWA” or the “Act”) regulation, the BDD is at immediate risk from unregulated discharges to these ephemeral tributaries that feed into the Rio Grande.

The BDD has a strong and direct interest in the water quality of its source water from the Rio Grande and the tributaries that contribute flow to the Rio Grande. The BDD diverts surface water from the Rio Grande and treats it to federal Safe Drinking Water Act (42 U.S.C. §§300f-300j-26 (2018)) standards to supply clean water to the citizens of the City and County of Santa Fe. Any increase in contamination or sedimentation of the Rio Grande has a direct impact on the BDD’s ability and its expense to divert and treat this source water to drinking water standards.

1 The BDD relies on CWA permitting and control of industrial and stormwater discharges to
2 upstream ephemeral streams to maintain and preserve the water quality of its source water.
3 Permits issued under the CWA have stringent requirements limiting discharges of pollutants to
4 ensure that state water quality standards are met and maintained. *See* 33 U.S.C. § 1342(a)(1)
5 (2019). CWA permits are particularly important in New Mexico because the State has not
6 obtained authorization from the U.S. Environmental Protection Agency (USEPA) to administer
7 its own CWA permitting program. As one of only three states that lack permitting authority
8 under the CWA, New Mexico relies on the USEPA to administer the permitting program under
9 Section 402 of the Act for point source pollution. *See generally*, 33 U.S.C. § 1342. Like most
10 states, New Mexico relies on the Army Corps of Engineers to administer the permitting program
11 under Section 404 of the Act for the discharge of dredged and fill material. *See generally*, 33
12 U.S.C. § 1344 (2018). The categorical exclusion of ephemeral streams under the Rule from
13 CWA protections removes the existing regulations on discharges to the ephemeral streams in
14 New Mexico. *See* 85 Fed. Reg. at 22,251.

15 The BDD further relies on the New Mexico Standards for Interstate and Intrastate
16 Surface Water that were developed in reliance on the USEPA and Army Corps of Engineers'
17 (hereinafter collectively the "Agencies") longstanding interpretation of the definition of "waters
18 of the United States" (WOTUS). NM Admin. Code 20.6.4. These regulations define water
19 quality standards for New Mexico streams, including ephemeral streams, such as those that drain
20 LANL property upstream of the BDD. While New Mexico does not issue permits under the
21 CWA, it does certify those permits issued by the USEPA as protective of New Mexico Water
22 Quality standards under Section 401 of the Act. *See generally* 33 U.S.C. § 1341 (2018). The
23 Rule undermines these water quality standards for the surface waters of the State by removing
24 the existing regulation of ephemeral waters in New Mexico regardless of their hydrologic
25 connection to permanent surface waters.

26 Nearly all streams in New Mexico (89%) are ephemeral streams that have now lost CWA
27 protection under the Rule. In promulgating the Rule, the Agencies characterized it as

“balanc[ing] the regulation of the Federal government with the authority of States and Tribes to more appropriately regulate certain waters[.]” 85 Fed. Reg. at 22,287. In New Mexico the Rule has upended the existing balance between the federal and state water quality programs, leaving the majority of waterways in the State unprotected in a wide regulatory gap. New Mexico is unable to fill the regulatory gap left between the coverage of prior CWA definitions of jurisdictional WOTUS and the exclusions under the Rule. Dkt. No. 214-7 ¶ 21; Declaration of Rebecca Roose (Roose Decl.). This gap means that the risk of pollution and increased sediment to the BDD’s source water, and the corresponding increased cost of treatment, will fall on the BDD and its customers, rather than upstream polluters.

Leaving the Rule in place, while the Agencies conduct a new rulemaking to replace the Rule will leave the BDD exposed to the serious risks posed by the Rule, even after the Agencies have recognized the flaws in the Rule. The BDD supports the Plaintiffs’ Partial Opposition to Defendants’ Motion for Remand Without Vacatur because the Rule should be vacated due to its harmful effects on the BDD and other surface water users in the New Mexico.

ARGUMENT

I. THE RULE IS LEGALLY DEFICIENT AND SHOULD BE VACATED

The Rule is contrary to the express objectives of the CWA as it undermines the ability of states to prevent, reduce, and eliminate water pollution. The CWA is the basis of federal surface water protections, with its objective to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a) (2018). The Rule, however, is an impermissible interpretation of the CWA by the Agencies because it is contrary to these express and unambiguous objectives of the Act. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress.”). The Rule disregards the primary objective of the CWA set forth in Section 101, and is thus not “based on a permissible construction of the statute.” *Id.* at 843. Nor is the Rule tied to the purpose of the CWA, which is the restoration and maintenance of water quality.

1 *Judulang v. Holder*, 565 U.S. 42, 64 (2011). The Rule is an impermissible interpretation of the
2 CWA because it is directly at odds with the purpose of the Act. *NRDC v. Nat'l Marine Fisheries*
3 *Serv.*, 421 F.3d 872, 879 (9th Cir. 2005).

4 In addition to presenting an impermissible construction of the CWA, the Rule fails to
5 account for the Agencies' prior interpretations of the Act and the reliance of states like New
6 Mexico on those prior interpretations. Because the Rule is arbitrary and capricious it should be
7 vacated before being remanded to the Agencies for a new rulemaking. *See* 5 U.S.C. § 706(2)(A)
8 (2018). While an agency is not always required to provide a more detailed justification for a rule
9 change, "it must—when, for example, its new policy rests upon factual findings that contradict
10 those which underlay its prior policy; or when its prior policy has engendered serious reliance
11 interests that must be taken into account." *Fed. Commc'ns Comm'n v. Fox Television Stations,*
12 *Inc.*, 556 U.S. 502, 515 (2009). The Rule fails to address "whether there were reliance interests,
13 determine whether they were significant, and weigh any such interests against competing policy
14 concerns." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020).
15 The Agencies' failure to perform this required balancing makes the Rule arbitrary and
16 capricious.

17 Rather than providing a detailed justification for excluding ephemeral streams from
18 CWA coverage, the Rule merely concludes that the exclusion "rests upon a reasonable inference
19 of ecological interconnection" without offering any factual support for that inference. 85 Fed.
20 Reg. at 22,310 (internal quotation marks and citation omitted). Based upon this conclusory
21 statement, the Agencies have changed the underpinnings of the CWA permitting program that
22 the BDD has relied on for controlling pollution to its source waters.

23 Under the Agencies' prior guidance, ephemeral streams with significant nexus to a
24 traditional navigable water were considered jurisdictional waters under the CWA. *See Clean*
25 *Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United*
26 *States & Carabell v. United States* (Dec. 2, 2008) Administrative Record (AR) EPA-HQ-OW-
27 2018-0149-11695 (AR-11695). As jurisdictional waters, such ephemeral streams, including those

1 draining the Pajarito Plateau and LANL, were subject to the federal permitting requirements
2 under Sections 402 and 404. The Rule fails to address the serious and legitimate reliance of New
3 Mexico, and New Mexico water users, on the permitting programs developed under their prior
4 definition of WOTUS as required by *Fox*. The Agencies did not justify the exclusion of
5 ephemeral streams by any “compelling policy decisions,” but rely instead on the conclusory
6 statement regarding “reasonable inference of ecological interconnection.” 85 Fed. Reg. at
7 22,310. Nor did the Agencies attempt to balance this statement against the significant reliance of
8 water users like the BDD on the Agencies prior interpretations of the CWA as reflected in prior
9 agency guidance, as was required by *Regents of the Univ. of Cal.* This failure makes the Rule
10 arbitrary and capricious.

11 The Agencies also relied on an incorrect legal interpretation of “their authority under the
12 Constitution and the language, structure, and legislative history of the CWA,” to justify the
13 categorical exclusion of ephemeral streams from the Rule. 85 Fed. Reg. at 22,270. The Rule
14 describes that the exclusion of ephemeral streams “most appropriately balances the Federal
15 governments interest in regulating the nation’s navigable waters with respecting State and Tribal
16 land use authority over features that are only episodically wet during and or following
17 precipitation events.” 85 Fed. Reg. at 22,319. In support of this conclusion the Agencies cite to
18 Justice Scalia’s opinion in *Rapanos* for the proposition that ephemeral streams were “beyond the
19 scope of CWA jurisdiction.” *Id.* Importantly, this constrained reading of CWA jurisdiction as
20 categorically excluding ephemeral streams was rejected by a plurality of the *Rapanos* Court. *See*
21 *Rapanos v. U.S.*, 547 U.S. 715, 769-70, 800. (Kennedy, J., concurring) (rejecting the pluralities
22 exclusion of irregular waterways as unsupported by the statutory text); (Stevens, J., dissenting)
23 (rejecting plurality exclusion of water beds that are periodically dry). This justification also fails
24 under both *Fox* and *Regents of the Univ. of Cal.*, because it is both incorrect and fails to balance
25 the change in the Agencies’ interpretation of CWA jurisdiction against the significant reliance
26 interests of water users, like the BDD, who are affected by the drastic change represented by the
27 Rule.

1 Congress unambiguously set forth its view regarding the appropriate balance of state and
 2 federal interests in Section 101(b),

3 “[i]t is the policy of the Congress to recognize, preserve, and protect the primary
 4 responsibilities and rights of States *to prevent, reduce, and eliminate pollution, to*
 5 *plan the development and use (including restoration, preservation, and*
enhancement) of land and water resources, and to consult with the Administrator
in the exercise of his authority under this [Act].”

6 33 U.S.C. §1251(b) (emphasis added). Additionally, the Act declares that “[t]he objective of this
 7 [Act] is to restore and maintain the chemical, physical, and biological integrity of the Nation’s
 8 waters.” *Id.* §1251(a). As ably argued by Plaintiffs in their Motion for Summary Judgment,
 9 Section 101(b) recognizes the authority of states to enact water quality regulations that are more
 10 protective than the federal regulatory floor set by the CWA, and to allow the states to operate the
 11 permitting programs required by the Act. [Dkt. No. 214, pg. 33, Plt’s MSJ]. In contrast to the
 12 plain text and purpose of Section 101 of the Act, the Rule undermines New Mexico’s “right to
 13 prevent, reduce, and eliminate pollution” by eliminating a critical tool that the State had to do
 14 so—Section 402 permitting for ephemeral streams.

15 As noted in the Agencies Notice of Motion and Motion for Voluntary Remand Without
 16 Vacatur, the Agencies now acknowledge substantial concerns about the Rule and its effects on
 17 the nation’s waters. [Dkt. No. 250, pg. 13, Defs.’ Mot. for Remand w/o Vacatur]. Specifically, the
 18 Agencies describe their concerns about the impacts of the exclusion of ephemeral waters. *Id.*
 19 Further, the Agencies note that they have serious concerns about the Rule’s consideration of the
 20 effect of ephemeral streams on the chemical, physical, and biological integrity of the nation’s
 21 waters. Declaration of Radhika Fox (Fox. Decl.) ¶ 14. As now acknowledged by the Agencies,
 22 the categorical exclusion of ephemeral waters was not sufficiently supported, however the harm
 23 to those ephemeral waters and connected perennial waters will continue unless the rule is
 24 vacated.

II. THE RULE UNDERMINES THE PROTECTION OF THE BDD'S SOURCE WATER AND SHOULD BE VACATED

A. The Rule Creates a Regulatory Gap by Excluding Ephemeral Streams that Directly Contribute Pollution to the Rio Grande

New Mexico is one of three states in the Nation that do not have USEPA authorized National Pollutant Discharge Elimination System ("NPDES") permitting authority under Section 402 of the Act. UNITED STATES ENV'T PROTECTION AGENCY, NPDES State Program Authority, <https://www.epa.gov/npdes/npdes-state-program-authority>. In the absence of an authorized state-based Section 402 permitting program, New Mexico relies on the USEPA to administer its Section 402 permitting. New Mexico has no existing state pollution discharge permitting program that can fill the gap created by the Rule's exclusion of ephemeral streams. Roose Decl. ¶ 21. Developing a state program in New Mexico to fill the newly created regulatory gap will take significant time and resources. Roose Decl. ¶ 22. Further, there is no authority for local governments, such as the City of Santa Fe and Santa Fe County, to fill this permitting gap.

Approximately 89% of New Mexico's rivers and streams are ephemeral. Roose Decl. ¶ 6. Under the Rule all these ephemeral streams are categorically excluded from CWA permitting requirements. 85 Fed. Reg. at 22,251. LANL covers approximately 40 square miles on the Pajarito Plateau. Several ephemeral streams drain the Pajarito Plateau and LANL currently has two Section 402 permits, Permit No. NM0028355 for industrial discharges, and Permit No. NM0030759 for stormwater runoff, for discharges to these ephemeral streams. NM ENV'T DEPT., Surface Water Quality NPDES Permits, <https://www.env.nm.gov/surface-water-quality/npdes-permits/>. These permits were required under the Agencies' prior guidance requiring permits for ephemeral streams that have a significant nexus with the Rio Grande. With the removal of CWA jurisdiction over these streams, the BDD must operate under the assumption that unpermitted and uncontrolled point-source discharges of industrial and stormwater pollutants will migrate to the Rio Grande. This creates a new risk to the BDD, its customers, and its allocation of scarce resources to treat the water that it provides to the community of Santa Fe.

1 The BDD diverts surface water from the Rio Grande, a designated traditionally navigable
 2 water under an Approved Jurisdictional Determination. Roose Decl. ¶ 6. The BDD intake
 3 structure is located approximately three miles downstream from the confluence of the Rio
 4 Grande and the ephemeral Los Alamos/Pueblo Canyon, which has a watershed encompassing a
 5 large portion of the LANL property. Since its inception in the 1940s, LANL has created a vast
 6 area of toxic legacy contamination, including heavy metals, organic and inorganic compounds,
 7 and radionuclides. ENV'T MGMT. LOS ALAMOS FIELD OFFICE, Legacy Cleanup,
 8 <https://www.energy.gov/em-la/services/legacy-cleanup>. These legacy contaminants are present
 9 in many locations, including sediments in the canyon bottoms that are often subject to floods
 10 which move the sediments and associated contaminants downstream to the Rio Grande. LANL
 11 also has at least 11 industrial outfalls where liquid waste is discharged to the ephemeral streams
 12 in the canyons under its current industrial NPDES Section 402 permit. LANL Industrial
 13 Wastewater Permit No. NM0028355, [https://www.env.nm.gov/surface-water-quality/npdes-](https://www.env.nm.gov/surface-water-quality/npdes-permits/)
 14 [permits/](https://www.env.nm.gov/surface-water-quality/npdes-permits/). Los Alamos/Pueblo Canyons regularly flow in direct response to summer rain events
 15 and winter snowmelt, and the transport of legacy contamination from LANL through these
 16 canyons is well documented. BUCKMAN DIRECT DIVERSION, Water Quality History,
 17 <https://bddproject.org/history/water-quality-history/>.

18 LANL contains hundreds of contaminated sites that are affected by stormwater runoff,
 19 which carries contamination to the Rio Grande. Many of these areas of contamination and the
 20 means of migration to the Rio Grande were assessed, monitored, and controlled under LANL's
 21 Section 402 permits for industrial and stormwater discharges under the prior jurisdictional
 22 definition of waters of the United States. *See* LANL Storm Water Individual Permit No.
 23 NM0030759, <https://www.env.nm.gov/surface-water-quality/npdes-permits/>. Los Alamos
 24 Canyon, which was covered under the prior permitting program, is among the many ephemeral
 25 streams that drain from LANL and that have a significant hydrologic nexus to the Rio Grande.
 26 NM Admin. Code 20.6.4.128. Under the prior CWA permitting, the USEPA required LANL,
 27 among other things, to manage run-on and runoff from the contaminated sites, control erosion

1 and sedimentation from those sites, and to monitor stormwater discharges to confirm that control
 2 structures and measures are working to prevent downstream contamination. LANL Storm Water
 3 Individual Permit No. NM0030759, pp. 3-5 of Part I. Under the Rule, these ephemeral streams
 4 are no longer jurisdictional waters, and no longer require Section 402 permitting for these
 5 stormwater discharges. This lack of coverage under the Rule significantly raises the threat that
 6 LANL legacy contamination will reach the Rio Grande and negatively impact the BDD.

7 The exclusion of ephemeral streams also eliminates required Section 404 permitting for
 8 dredge and fill operations in those streams. Under the prior interpretation of the CWA, dredge
 9 and fill operations in ephemeral streams with a significant nexus to a navigable waterway were
 10 required to obtain a permit from the Army Corps of Engineers under Section 404 of the Act. AR-
 11 11695; *see* 33 U.S.C. § 1344 (Secretary may deny permit whenever he determines that
 12 discharges of such materials will have an adverse affect on municipal water supplies). Section
 13 404 permitting in New Mexico is administered by the U.S. Army Corps of Engineers and will no
 14 longer be required for ephemeral streams. Roose Del. ¶ 9. Dredge and fill activities pose a
 15 particularly consequential risk to Rio Grande water users because many of the ephemeral streams
 16 on the Pajarito Plateau contain legacy waste going back to the Manhattan Project. Legacy
 17 Cleanup. Any unpermitted dredge and fill discharges in the ephemeral streams draining the
 18 Pajarito Plateau and LANL present a salient threat to the BDD because of this history of legacy
 19 waste at LANL and the associated the sediments of the canyons.

20 **B. New Mexico is Unable to Fill the Regulatory Gap created by the Categorical**
 21 **Exclusion of Ephemeral Waters, Leaving the BDD Exposed to Pollution to its Source**
 22 **Water**

23 The Agencies describe that the Rule does not determine “which of the nation’s waters
 24 warrant environment protection and which do not; rather the agencies interpret the definition as
 25 drawing the boundary between those waters subject to federal requirements under the CWA and
 26 those waters that States and Tribes are free to manage under their independent authorities.” 85
 27 Fed. Reg. at 22,270. However, this does not acknowledge how the states, and in this instance the

1 BDD, have developed their regulatory programs in reliance upon the longstanding agency
2 interpretation of the Act as covering ephemeral streams, and the resulting permitting
3 requirements. For example, the BDD, which was completed in 2011, was designed and built in
4 reliance on the permitting requirements for LANL and other upstream discharges as part of the
5 regulatory background protecting its source water. The exclusion of ephemeral streams from
6 CWA jurisdiction and permitting requirements has created a regulatory gap which upends the
7 framework under which the BDD was designed and built.

8 As a practical matter, the State of New Mexico cannot currently fill the regulatory gap
9 created by the Rule. New Mexico is the only state without permitting authority under the CWA
10 in the arid west. NPDES State Program Authority. The permitting program is the primary
11 mechanism under the Act for regulating and limiting discharges of pollutants into the waters of
12 the United States. *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S.Ct. 1462, 1469 (2020). For New
13 Mexico to develop, adopt, and implement a state-based permitting program that will fill the
14 permitting gap will require significant time, funding, and staff. *Roose Decl.* ¶ 22. Unlike states
15 with established permitting programs, New Mexico does not have the legal and procedural
16 program infrastructure to issue and enforce discharge permits to regulate discharges of pollutants
17 to the ephemeral waterways of the state. *Id.* This gap leaves the burden created by water
18 pollution on the water users of the state, including the BDD.

19 To start up a new permitting program that would fill the regulatory gap, New Mexico will
20 require a massive increase in funding for its surface water quality activities, new rulemaking
21 proceedings, and a reallocation of scarce resources to a new program and the significant time
22 required to accomplish this reorganization. *Roose Decl.* ¶¶ 20, 22, 23. The New Mexico
23 Environment Department has evaluated the costs to create a new permitting program, and found
24 that it will cost over \$7.5 million annually, which represents an increase of 115% to the budget
25 of the Surface Water Quality Bureau, which would be responsible for such a program. *Roose*
26 *Decl.* ¶ 22. In addition, New Mexico lacks the legal and procedural mechanisms to issue and
27 enforce NPDES-like permits and will require statutory amendments and new rulemaking to

1 create the newly required authority. Roose Decl. ¶ 20. As noted by Ms. Roose, the most recent
 2 rulemaking related to surface water quality lasted three years before the regulations became
 3 effective. *Id.* Because of budget constraints, the State will be forced to reallocate resources to fill
 4 this regulatory gap. Roose Decl. ¶ 23. This reallocation will weaken the regulatory capabilities of
 5 the State in other related areas, increasing the burden on water users like BDD. *Id.*

6 **III. THE BDD PROJECT IS UNIQUELY AND PARTICULARLY IMPACTED BY THE RULE**

7 Because of its location—downstream from the ephemeral streams that drain current and
 8 former LANL property and the legacy waste contained in the sediments of those ephemeral
 9 streams—the BDD is uniquely and particularly impacted by the Rule. The individual stormwater
 10 and industrial NPDES permits at LANL will be among the many CWA individual permits that
 11 will no longer be required under the Rule, which will result in unregulated discharges and
 12 pollutants entering ephemeral streams flowing to the Rio Grande upstream of the BDD. The
 13 Section 402 permitting for LANL currently controls industrial discharges of a range of heavy
 14 metals including chromium, arsenic, and mercury, in addition to adjusted gross alpha. LANL
 15 Industrial Wastewater Permit No. NM0028355. As a water user, the BDD does not have
 16 jurisdiction or authority to regulate or prevent upstream pollution, and relies instead on the
 17 permitting programs administered by the EPA and State of New Mexico for that protection.

18 Through its state of the art water treatment system, the BDD produces safe drinking
 19 water that meets and exceeds the standards of the Safe Drinking Water Act, 42 U.S.C. 300f to
 20 300j-26. However, the quality of the source water has a significant impact on the treatment
 21 process and costs required to produce high quality drinking water for the BDD's customers.
 22 Under certain conditions, including increased turbidity, or storm flows from the ephemeral
 23 streams that drain the Pajarito Plateau, the BDD must shut down its surface water intake until the
 24 sediment pulse passes the intake. By shutting down its diversion intake, the BDD avoids damage
 25 to its water filtration and treatment equipment, and avoids diverting water carrying sediment and
 26 the entrained legacy waste from LANL which may include radionuclides and heavy metals.
 27 Water Quality History. In addition, any contamination that is removed in the water treatment

1 process poses increased disposal costs and regulatory burdens to the BDD. The existing risks to
2 the BDD source water are managed with careful monitoring of the flows of the Rio Grande and
3 the upstream ephemeral streams that contribute storm flows and the transport of legacy waste to
4 the Rio Grande. BUCKMAN DIRECT DIVERSION, Early Notification System,
5 <https://bddproject.org/water-quality/early-notification-system/>.

6 BDD has taken a proactive approach to protecting its source water quality. In addition to
7 ceasing diversion from the Rio Grande when the potential for polluted water is the highest, the
8 BDD has also worked within the prior regulatory framework to restore and maintain the water
9 quality of the Rio Grande. As described above, *infra* p. 2, New Mexico may impose conditions
10 on USEPA issued Section 402 permits for discharges into jurisdictional waters so that those
11 permits comply with New Mexico water quality standards. The BDD has engaged with New
12 Mexico regulators and petitioned the State Water Quality Control Commission under the State's
13 Triennial Review process for setting Standards for Interstate and Intrastate Surface Waters to set
14 protective water quality standards for radionuclides for the Rio Grande. NM Admin. Code.
15 20.6.4.900.

16 The BDD has also worked with State regulators to develop a source water protection plan
17 for the Rio Grande and surrounding watershed. This source water protection plan relies on and
18 incorporates the existing LANL, and other CWA permitting, to describe the baseline conditions
19 of the watershed. These auxiliary regulatory tools, which have been supported by the BDD and
20 other water users, are undermined by the loss of required permitting for discharges into the
21 ephemeral streams of the Pajarito Plateau. As part of its ongoing efforts to protect its source
22 water the BDD filed comments on the Rule, reflected at AR-5151, setting forth the risks posed to
23 the BDD and other water users by the categorical exclusion of ephemeral streams, among other
24 items. The Agencies' failed to address the BDD comments in the final Rule.
25
26
27

CONCLUSION

For the foregoing reasons, this Court should grant the Plaintiffs' Partial Opposition to Defendant's Motion for Remand Without Vacatur, and vacate the Rule prior to remanding to the Agencies.

Dated: August 17, 2021

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing, on August 17, 2021.

/s/ Jason R. Flanders